Supreme Court, U.S.
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No. 01-301 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

ANTHONY NEWLAND, Petitioner,

v.

TONY EUGENE SAFFOLD, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether, where the rules for the timely filing of a petition for habeas corpus are not clear and the state court gives no reasons for denying a petition for lack of diligence, a federal court properly defers to a state court's decision to rule on the merits when determining whether an application for writ of habeas corpus is entitled to tolling under 28 U.S.C. § 2244(d)(2)?

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RESPONDENT'S BRIEF IN OPPOSITION

Mr. Saffold respectfully requests that this Court deny the petition for writ of certioran seeking review of the judgement of the Court of Appeal for the Ninth Circuit that reversed the District Court's order dismissing Mr. Saffold's application for writ of habeas corpus as failing to satisfy the statute of limitations for a state prisoner filing a federal habeas corpus petition.

STATEMENT OF THE CASE

Petitioner Newland's digest of the proceedings neglects to mention that at all times during his pursuit of post-conviction relief, Mr. Saffold acted conscientiously and without undue delay. After a timely appeal, Mr. Saffold's state court conviction became final on April 20, 1992. On April 24, 1996, AEDPA imposed a new statute of limitations. On April 17, 1997, before the expiration of the statute, Mr. Saffold filed a habeas application in state superior court by delivering the petition to prison authorities. This petition was denied solely on the merits on June 9, 1997. Mr. Saffold received notice that his petition had been denied on June 14, 1997, and filed his petition with the California Court of Appeals the same day by delivering it to prison officials. On June 26, 1997, the Court of Appeals denied Mr. Saffold's petition solely on the merits. Mr. Saffold was not put on notice by the Court of Appeals that habeas corpus relief had been denied until November 10, 1997. However, on the very day he received notice of the Court of Appeals' denial, Mr. Saffold filed a petition for writ of habeas corpus with the California Supreme Court by delivering it to prison officials. On May 27, 1998, the California Supreme Court denied Mr. Saffold's petition. On June 2, 1998, the same day he received notice that the California Court denied his petition, Mr. Saffold filed his application for a writ of habeas corpus in the United States District Court delivering it to prison officials. App. A at 9; App. B at 7.

REASONS THE WRIT SHOULD BE DENIED

Petitioner Newland neglects a critical fact in the introductory statement of his petition. He asserts that the California State Supreme Court dismissed Mr. Saffold's habeas corpus petition for "lack of diligence." Pet. at i. This assertion is incomplete and misleading. In fact, the California Supreme Court denied Mr. Saffold's petition *both* on the merits and for "lack of diligence." The Ninth Circuit Court of Appeal declined to dismiss Mr. Saffold's application as outside the statute of limitations set forth in 28 U.S.C. § 2244(d)(1) precisely because California's highest court addressed the petition on the merits. Noting that the whole purpose of the tolling provision of 28 U.S.C. § 2244(d)(2) was to permit state courts the opportunity to rule on the merits of a claim, the Ninth Circuit found that the entire period during which Mr. Saffold pursued state remedies was tolled. The Ninth Circuit's reasoning was right, shows a proper deference to California's procedures, and should not be disturbed. Furthermore, the reasoning in *Saffold* is critically dependent on unique aspects of California law and, as such, the claimed conflict with holdings in other circuits is illusory. Finally, because the Court of Appeal's holding turns on peculiarities of California law, and because a critical aspect of the record below is silent, *Saffold* is not the appropriate vehicle for this Court to determine meaning of AEDPA's tolling provision.

I

THE COURT OF APPEAL'S DECISION WAS CORRECT AND PROPERLY DEFERS TO STATE COURT HOLDINGS

In *Saffold*, the Court of Appeal was presented with an unusual situation. The California State Supreme Court had denied Mr. Saffold's petition both on the merits and for lack of diligence – but with no explanation for why the petitioner was dilatory. Moreover, it was apparent that there were no clear California timeliness rules to which the Court of Appeal could refer in determining for itself whether Mr. Saffold had sought post-conviction relief in a timely manner. Indeed, as the California Supreme Court has itself noted in *In re Harris*, 5 Cal.4th 818, 23 Cal.Rptr. 2d 373 (1993), the rule regarding timeliness is only that a habeas petition "be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 5 Cal.4th at 828, n.7. Under California state law, if the petition is not filed within the time within which counsel knew or should have known the basis for the claim then the petitioner must demonstrate "good cause" for the delay. *In re Stankewitz*, 40 Cal.3d 391, 397 n. 1, 220 Cal.Rptr. 382 (1985); *In Re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). Additionally, as the Ninth Circuit has noted, California has never ". . . established what amount of delay the court would consider "substantial," nor [has it] set out criteria for determining "good cause" to excuse such delay. *Morales v. Calderon*, 85 F.3d 1387, 1390-1393 (9th Cir. 1996). Hence, "[n]o clear rule of state law prohibited petitioner from filing a state habeas corpus petition at the time he did." *Morales*, 85 F.3d at 1391.

Faced with this situation, where Mr. Saffold had violated no clear rule of California state

law, and where the California Supreme Court alluded to a potential procedural problem without explanation, while at the same time ruling on the merits, the Court of Appeal decided two things in relation to the State's claim that Mr. Saffold failed to file his application within the AEDPA's statute of limitations. First, the Ninth Circuit ruled that if Mr. Saffold was properly pursuing his post-conviction state remedies then AEDPA's statute of limitations would be tolled for the entire time that he was in state court. 28 U.S.C. § 2244(d)(2). Second, the Court of Appeal determined that because the California Supreme Court ruled on the merits of his petition, Mr. Saffold was properly pursuing state remedies. These holdings were correct.

Petitioner Newland does not dispute that the Ninth Circuit correctly ruled that if Mr. Saffold was properly pursuing his post-conviction state remedies then AEDPA's statute of limitations was tolled for the entire time that Mr. Saffold was in state court. Nor could he. In this holding, the *Saffold* court was simply following established law as articulated in *Nino v. Galaza* 183 F.3d 1003 (9th Cir. 1999), *cert denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). *Nino* held that periods between the disposition by a lower court and the filing for the next level of post-conviction relief in an appellate court is considered "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* at 1006.

The *Nino* holding is sound. The holding promotes an orderly process by facilitating complete state review before the filing of a federal petition. It does so by permitting a petitioner to use state procedures without fear that a subsequent federal petition would be barred by the statute of limitations. As the *Nino* Court pointed out, ". . . a contrary construction [of the tolling provision] would be antithetical to the entire theory of state remedy exhaustion and would

inevitably lead to the filing of protective federal habeas petitions." *Nino*, 183 F.3d at 1005. Furthermore, every single circuit that has considered the question of tolling during state post-conviction proceedings has held that a petitioner has the benefit of statutory tolling so long as he is "properly pursuing" state post-conviction procedures. *See*, *Swartz v. Meyers*, 204 F.3d 417, 420 (3rd Cir 2000); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999); *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999); *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir.1999); *Mills v. Norris*, 187 F.3d 881, 884 (8th Cir.1999).

Not able to challenge the *Saffold* opinion on its significant holding, petitioner Newland argues only that Mr. Saffold was himself not "properly pursuing" state remedies. Newland cites the dissenting opinion in *Saffold* for the proposition that Mr. Saffold had "obviously dallied" with respect to filing his petition in the California Supreme Court four months after the denial in the Court of Appeals -- and in so doing violated clear state procedural rules. Petitioner claims that this shows that Mr. Saffold was not "properly pursuing" state remedies, and, as such, fell into an exception delineated in *Nino*, whereby tolling would not be permitted if the applicant "engaged in substantial delay in asserting habeas claims." Pet. at 7; App. A at 17; *Saffold*, 250 F.3d 1262, 1270 (9th Cir. 2000); App. B at 14; *Saffold*, 224 F.3d 1087, 1092 (9th Cir. 2000); see *Nino*, 183 F.3d at 1006, n. 4.

In a footnote in *Nino*, the Court of Appeal stated that it expressed no opinion about whether tolling would be permitted if the petitioner engaged in "substantial delay in asserting habeas claims," citing two state court cases, *In Re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993) and *In re Robbins*, 18 Cal.4th 770, 810, 77 Cal.Rptr. 2d 153 (1998). *Nino* 183 F.3d at 1006, n. 4. This suggests, albeit in dicta, that should the California Supreme Court find that a

petitioner has "substantially delayed" in asserting his habeas claims, then the statute will not be tolled. However, in its one-sentence denial of Mr. Saffold's petition, the California Supreme Court did *not* hold that Mr. Saffold had engaged in "substantial delay." Indeed, it stated only that Mr. Saffold showed "lack of diligence." The California Supreme Court did not cite either *Robbins* or *Clark* in its holding, as it surely would have done if it had meant to invoke the timeliness doctrine articulated in those two cases. Hence, even assuming that this dicta has the force of law, it is not even clear that this case falls within it.

Furthermore, it is simply not true that Mr. Saffold was violating clear state procedural rules, as petitioner Newland claims. As was pointed out by the *Saffold* majority: "There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal." App. A at 9; *Saffold*, 250 F.3d at 1266 n. 4; App. B at 7; *Saffold* 224 F.3d at 1089 n. 4. The applicant may petition for review or file an original petition in the California Supreme Court. *Nino*, 183 F.3d at 1006 n. 3. A petition for review is governed by California Rule of Court 28(b) which requires a petition be filed within ten days after the Court of Appeal's decision was final. However, "Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final." App. A at 9; *Saffold*, 250 F.3d at 1268 n. 4; App. B at 7; *Saffold* 224 F.3d at 1089 n. 4. Therefore, Mr. Saffold violated no clear procedural deadlines when he filed his petition.

Contrary to petitioner Newland's assertion, the majority's decision to toll the time Mr. Saffold spent pursuing his post-conviction remedies was highly deferential to state court procedures. Since AEDPA's tolling provision speaks in terms of "properly filed applications for

state post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), application of the provision is necessarily grounded in and defined by considerations of state law. Federal courts must defer such considerations to the state courts. *See Nino*, 183 F.3d at 1005. "The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim." *Saffold*, 224 F.3d at 1090. When a state court resolves a petition on the merits, the limitations period should be tolled for the entire period that the petition was under consideration, including gaps between the filing of the petitions. *Id.* Any other result would force a petitioner to file a protective federal petition. The result in *Saffold* therefore "reinforces the orderly presentation of claims to the appropriate state tribunals and obviates the need for federal action...." *Nino*, 183 F.3d at 1005. Since the *Saffold* court merely reaffirmed established law that a petitioner properly pursuing state procedures should have the time spent in state court tolled, and then correctly applied that proposition under the circumstances of Mr. Saffold's case, the decision in *Saffold* is a correct statement of the law and should not be disturbed by this Court.

II

THE NINTH CIRCUIT'S RULING DOES NOT CONFLICT WITH OTHER CIRCUITS

Petitioner Newland asserts that the opinion in *Saffold* conflicts with cases from the Fifth, Seventh, and Tenth Circuits, namely *Melancon v. Kaylo* No. 00-30439, ____ F.3d ___, 2001 WL 822453 (5th Cir. Aug. 6 2000); *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2001); and *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000). But the state statutory schemes at issue in each of those cases differ in critical respects from that considered in *Saffold*. There is no conflict.

Gibson, *Fernandez*, and *Melancon* all considered rulings from states where state rules for filing applications for post conviction relief are clear.[3] The statutory schemes that were considered in these cases, in Oklahoma, Illinois and Louisiana respectively, all have clearly defined time periods within which an applicant must pursue additional post-conviction relief if denied at a lower level of the state court system. In all of the above cases, it is clear that *if* the applicants had filed for relief within the time allotted, then AEDPA's statute of limitations would have been tolled for the period between the denial of relief by one court and the filing for relief in the next, even if the applicant waited until the very last day of the period. *Fernandez*, 227 F.3d at 980; *Rowe v. Lemaster*, 225 F.3d 1173, 1174 (10th Cir 2000); *Melancon*, 2001 WL 822453 at * 4.

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[3]In *Gibson*, from the Tenth Circuit, the petitioner filed a petition for state post-conviction relief, which the Oklahoma district court denied. Gibson did not file within the thirty days state law permitted to appeal; instead, he filed several untimely motions for leave to appeal. *Gibson*, 232 F.3d at 802. In *Fernandez*, from the Seventh Circuit, the Appellate Court of Illinois affirmed an order denying Fernandez' petition. Under Illinois law, Fernandez had twenty-one days to file a petition for leave to appeal, but missed this deadline. *Fernandez*, 227 F.3d at 978-979. In *Melancon*, the petitioner also failed to file his petition for state post-conviction relief within the time allotted by statute. *Melancon*, 2001 WL 822453 at * 1.

Mr. Saffold's situation is different. California, as pointed out above, does not have statutory deadlines for filing for post-conviction relief and does not have uniform case-law rules regarding when a case will be considered procedurally barred. See *Morales,* 85 F.3d at 1390-1393. Additionally, although the California Supreme Court has recently attempted to clarify the timeliness rules for post-conviction petitions in capital cases, see *Clark*, 5 Cal.4th at 797, they have not done so for non-capital cases such as Mr. Saffold's. Hence, unlike in Illinois, Oklahoma and Louisiana, where a federal court can easily determine whether a petitioner has abided by state court rules, in California, there are no clear state rules to which the federal court can defer.

The majority in *Fernandez* criticizes *Saffold* because, in its view, although it makes sense that a "petition continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation." *Fernandez*, 227 F.3d at 980. The majority complains that after denial in the Court of Appeals, Mr. Saffold did not have a petition again "pending" until he filed in the California Supreme Court. According to *Fernandez*, Mr. Saffold's requests applications were dead and only "resuscitated" once he filed in a new court. *Ibid.* The authors of *Fernandez* have failed to consider the ways in which California state procedure differs from that of Illinois. In California, Mr. Saffold could not appeal, or in any other way get direct review of, the denial of his superior court habeas corpus petition. *In re Crow*, 4 Cal.3d 613, 621 n.8, 94 Cal.Rptr. 254 (1971). Instead, the proper procedure for Mr. Saffold was to file an original petition in a Court of Appeals or in the California Supreme Court. If denied in the Court

of Appeals, in theory, Mr. Saffold could either have filed an original petition for habeas corpus or a petition for review from the denial. However, because California law requires filing of a petition for review within ten days of after the Court of Appeals case is final, California Rule of Court 28(b), and because he did not receive notification of the denial until over four months after it was entered, Mr. Saffold could only file an original petition. Because Mr. Saffold filed an original petition, there were no statutory time limitations on when he could file. By way of contrast, in Illinois, there is a clear time period within which a petitioner must continue the pursuit of state post-conviction relief. If the petitioner acts within that time period, there is no danger that AEDPA's statute of limitations will run out. This is because the period during which an Illinois petitioner for post-conviction relief has to perfect his appeal is considered "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Fernandez*, 277 F.3d at 980; see *Barnett v. Lemaster*167 F.3d at 1322-1323.

Although there is no set statutory period during which time will be tolled as a petitioner progresses through the state system, it makes sense that in California, just as in Illinois, there should be a time period whereby AEDPA's statute of limitations is tolled even though there is no petition waiting for a ruling, so that an applicant can pursue all state remedies in an orderly manner. Since in California there is no set time period, it is most in keeping with AEDPA's purposes to defer to a state court's decision to rule on the merits in determining whether a petition was "pending" while a petitioner pursued state remedies. This is exactly what the Court

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of Appeal did in *Saffold*. Hence, the *Fernandez*' criticism of *Saffold* is not well founded. Because of the differences between California and Illinois (as well Oklahoma and Louisiana), there is no conflict between the holdings from those states and that of *Saffold*.

III

THIS CASE DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL NATIONAL IMPORTANCE

Petitioner Newland argues that this Court should grant certiorari in this case because the issue of the meaning of "pending" for the purposes of the tolling provision is a matter of substantial importance. Pet. at 14. This case is not the appropriate one to resolve this issue.

Although the issue of when an application is "pending" within the meaning of 28 U.S.C. § 2244(d)(2) is a matter of federal law, *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir.1999), the federal courts must look to state procedural law for guidance in determine the meaning of the word. *Gibson*, 232 F.3d at 801. In states which have time limits for the appeal of the denial of post-conviction relief, the relevant state procedures are the state law periods for appeal. *Ibid.* As pointed out above, California's post-conviction system is completely different. As such, any resolution of the issue of the meaning of "pending" that would appropriately factor in California state procedures would have little relevance to the meaning of "pending" in other states and circuits. Hence, *Saffold* is not the appropriate case for this Court to consider the issue.

Furthermore, *Saffold* is not the appropriate vehicle to determine the meaning of "pending" because there is a critical gap in the *Saffold* record. In denying Mr. Saffold's petition on the merits, the California Supreme Court did not make clear why Mr. Saffold's petition was not diligent. Petitioner Newland and the dissent in *Saffold* assume that in denying the petition for lack of diligence the California Supreme Court was referring to the four months between his application to the California Court of Appeals and his application to the California Supreme Court. Pet. at 7; App. A at 9; App. B at 10. There is no reason to believe that this is so. As

noted above, Mr. Saffold's state court conviction was final in 1992. He did not file a petition for post-conviction relief until five years later in 1997. As the majority in *Saffold* observed, it is impossible to determine whether the California Supreme Court was referring to this five year period or to the four months between Mr. Saffold's two applications. App. A at 11; App B at 9-10. If the California Supreme Court was referring to the four month period between Mr. Saffold's two applications, then there is a missing factual determination from the record. As noted, Mr. Saffold filed his application for post-conviction relief with the California Supreme Court, the very day that he got notice of the denial of relief from the California Court of Appeals. There is nothing in the record about why this delay occurred. If the delay in notice was due to the dilatory actions of prison officials upon whom Mr. Saffold had no choice but to rely, then Mr. Saffold might be entitled to equitable tolling – in which case his application would be timely. See *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). However, because the *Saffold* court resolved the case for other reasons, the record below is silent on the issue of non-statutory tolling. Although this factual lacuna is critical to the outcome of this case, rather than ask the Court of Appeal to address and resolve these issues, petitioner Newland asks this Court to do so. This Court should only take cases where an adequate factual record exists to resolve the questions. Since this case not have an adequate factual record, and since petitioner Newland has not requested the Court of Appeal to resolve these open issues, certiorari should be denied.

CONCLUSION

Because the Court of Appeal's ruling was correct, does not conflict with the law of other circuits, and does not present an issue of substantial importance, Mr. Saffold respectfully requests that this Court deny the petition.

Respectfully submitted,

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